ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN AMERICAN UNIVERSITY PARK FRIENDSHIP HEIGHTS

c/o Lisner-Louise-Dickson-Hurt Home 5425 Western Avenue, NW Washington, DC 20015

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June 12, 2017

Darrin Sobin
Director
Office of Government Ethics
Board of Ethics
and Government Accountability
441 4th Street, N.W.
Suite 830 South
Washington, D.C. 20001

Dear Mr. Sobin:

ANC 3E writes regarding the Director of Government Ethics' ("Director") April 10, 2017 Draft Advisory Opinion ("April 2017 Opinion"). The April 2017 Opinion asserts that, since 2014, the "Code of Conduct" applicable to ANCs has included the District Personnel Manual ("DPM"). Yet, BEGA's training for ANCs, most recently available on BEGA's website earlier this year, has stated the opposite.
In light of BEGA's statements in these training materials made available to every ANC, if the April 2017 Opinion is correct, BEGA has suborned countless ethics violations by ANCs for three years.

Regardless, the April 2017 Opinion would result in unsound public policy that is inconsistent with the Council and the public's view of the role of ANCs over the past 40 years.

We respectfully ask the Director to withdraw his Opinion, and substitute it with one that calls for an open, sensible process for updating outdated ethics rules, and which is consistent with the Director's own previously-published and longstanding guidance.

In this letter resolution, we first review the legal background of the definition of "Code of Conduct" for ANCs, and then provide an illustration of the harm likely to be caused if the Director can apply the District Personnel Manual as written to ANCs.

BEGA's STATEMENT IN ITS ANC TRAINING THAT THE CODE OF CONDUCT FOR ANCs DOES NOT (CURRENTLY) INCLUDE THE DISTRICT PERSONNEL MANUAL IS CORRECT

DC law commands BEGA to provide direct training to all individuals under its jurisdiction. BEGA thus provided ethics training specifically for ANCs, and made the presentation available to hundreds of commissioners, both in person and online. The most recent official BEGA training for ANCs ("BEGA ANC Training"), last download from BEGA's website by a Commissioner from this ANC in early 2017, was by its terms updated on November 18, 2015.

The BEGA ANC Training states the following:

> **"Code of Conduct" for [ANCs] means those provisions contained in the following:** Conflict of Interest Provisions of the Ethics Act; and Annual "Clean Hands" Certification filed with BEGA.[1]

Notably *absent* from the BEGA ANC Training's definition of "Code of Conduct" for ANCs is the DPM. Yet, contradicting its own ANC training materials, the April 2017 Opinion contends that the Council amended ethics statutes in 2014 to leave no doubt that the definition of "Code of Conduct" for ANCs includes the DPM as written.

BEGA's April 2017 Opinion and the BEGA ANC Training cannot be reconciled. The Code of Conduct for ANCs either has included the DPM as written since 2014, in which case BEGA delivered materially false training to hundreds of Commissioners for years, or the April 2017 Opinion is materially wrong. BEGA should adapt the latter position.

DC's Department of Human Resource (DCHR), not BEGA, promulgated the DPM, which can be found at Chapter 18 of the District of Columbia Municipal Regulations (DCMR). That chapter of the regulations is entitled "*Employee* Conduct."[2] Moreover, Chapter 18 in fact leaves no doubt that it was intended to exclude ANCs, because it defines "employees," *ie*, the class of persons the DPM applies to, as individuals who receive compensation for service to DC government, are appointed to DC boards and commissions, or both.[3] *ANCs, by contrast,* are *neither compensated nor appointed* (they are unpaid elected officials).

Because DCHR excluded ANCs from the DPM, DCHR did not consider the particular expectations for and duties of ANCs in promulgating the DPM. Furthermore, because DCHR excluded ANCs from the DPM, DC citizens, including ANCs, had no reason to comment on the proposed DPM, thus *denying citizens, including ANCs, the fundamental due process protection of an opportunity to be heard in administrative policymaking that affects them*.

Against this background, the Council's decision in 2014 to redefine "Code of Conduct" for ANCs must be read as a command to BEGA *to amend* Chapter 18 so that it takes proper account of the expectations for and duties of ANCs in its substantive provisions, and so that DC citizens are afforded their due process rights to comment on any proposed amendments.

Under this reading, OGE has taken three years to begin to implement the Council's direction, but it has not affirmatively provided materially false training for years. Under Director Sobin's current reading, BEGA has, in fact, materially failed to comply with its statutory duty to train ANCs properly, and has indeed affirmatively misdirected ANCs.

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[1] "BEGA, Ethics Training, Advisory Neighborhood Commission (Presented by Darren P. Sobin, Director of Government Ethics, updated on 11/18/15) at 7 (emphasis in original) [[attached hereto as Exhibit 1] .

[2] Emphasis added.

[3] *See* DCMR § 6B-1899.1 and pertinent provisions cited therein.

The Substantive Guidance Provided in the April 2017 Opinion Demonstrates The Lack Of Fit Between The Current DPM And Expectations For And Duties Of ANCs

The District Charter created ANCs in 1973. Over the past 40+ years, Commissioners have served in countless non-profit organizations involved in local policy debates. In Ward 3 alone, current and former Commissioners have served, while Commissioners, in such organizations as PTAs, Local School Advisory Committees, Main Streets, the Committee of 100 on the Federal City, school and park site improvement teams, the Tenleytown Neighborhood Association, Ward Three Vision, the Alliance for Reasonable Development, DC for Democracy, and Ward Three Democrats – to name a few.

ANCs are, by design, the political body closest to the people. It is thus unsurprising that Commissioners are involved in numerous roles in their community. The Council has obviously known about this overlap; indeed, many Council Members and at least two Mayors, including the incumbent, have served as ANCs. Moreover, the Council recently updated the statutes governing ANCs. During this process, the Council could have but did not amend the law to change the historically close relationship between ANCs and other community organizations.

Yet, the DPM as written, and OGE's interpretation of the DPM in the April 2017 Opinion, could undo this relationship. In the April 2017 Opinion, OGE contends that an ANC Commissioner would violate the law by participating in a decision on a liquor license if a citizens group in which she is also a director plans later to take a position on the same application. OGE cites to a DPM provision that states that being a director of an outside group that might become involved in a decision recommended by "the employee" is not compatible with government service.[4]

If such a provision applies to ANCs, numerous Ward 3 Commissioners, and no doubt numerous Commissioners across DC, would either have to resign or frequently recuse as a Commissioner or resign from these outside groups.

Although such an outcome might be appropriate for the Director of the Department of Transportation, for instance, it is not appropriate for ANCs, and no substantial reason exists to believe it is an outcome the Council expected or desires. It is a strength of DC democracy, not a weakness, that an ANC who opines as part of her Commission on the Mayor's proposed school budget can also serve as a member of the PTA for her local school that likewise opines on the school budget. The ANC's experience on her Commission informs her service on the PTA and vice-versa.

To be sure, ANCs should publicly disclose their membership in outside groups involved with policy debates in which their ANC is also involved. ANCs must stand for election every two years, more frequently than either the Mayor or Council. Informed voters can decide in each instance whether an ANC's broad involvement in their community is a benefit or detriment.

There may be limited situations in which it makes sense for a Commissioner to recuse from a decision in which her or his outside group has taken a position. The proscription contained in the DPM as written, however, sweeps far too broadly. The solution is for BEGA to conduct notice and comment rulemaking, after consulting with ANCs and others, to craft ethics rules that make sense for ANCs as well as the employees and appointees for whom current rules were written.

[4] *See* April 2017 Opinion at 10-11 ("Example 8").

BEGA MUST UPDATE THE DPM ONE WAY OR THE OTHER

For all the reasons above, ANC 3E respectfully asks the Director to withdraw the April 2017 Opinion, and asks BEGA to initiate a careful, open process to amend the DPM via notice and comment rulemaking so that its dictates correspond with the Council and community's expectations for ANCs and their duties. If, nonetheless, the Director chooses not to withdraw the April 2017 Opinion, with the inescapable concomitant that BEGA has falsely instructed hundreds of ANCs about their legal obligations for years, BEGA should *still* amend the DPM via notice and comment rulemaking so that its dictates correspond with the Council and community's expectations for ANCs and their duties.[5]

The resolution passed by a vote of 4-0-0 at a properly noticed meeting held on June 8, 2017, at which a quorum was present, with Commissioners Bender, Hall, McHugh, and Quinn in attendance.

ANC 3E

Jonathan Bender

Digitally signed by Jonathan Bender
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By Jonathan Bender, Chair

CC Muriel Bowser
Charles Allen
Anita Bonds
Mary M. Cheh
David Grosso
Tameka Collier
Norma B. Hutcheson
Carol Scwartz
Shomari Wade
Gottlieb Simon

[5] Indeed, even were ANCs not involved, BEGA should still amend the DPM via notice and comment rulemaking, because the DPM was not drafted by an agency with putative expertise in government ethics.

EXHIBIT 1

Board of Ethics and Government Accountability

ETHICS TRAINING
ADVISORY NEIGHBORHOOD COMMISSIONS

Presented by:
Darrin P. Sobin
Director of Government Ethics
(Updated: 11/18/15)

Code of Conduct

- "Code of Conduct" for Advisory Neighborhood Commissions means those provisions contained in the following:
  - Conflict of Interest Provisions of the Ethics Act; and
  - Annual "Clean Hands" Certification filed with BEGA

But don't forget other laws that apply. For example:

- Federal bribery laws
- Prohibition on Political Activity on government premises
- Misuse or theft of government property/funds